Nos. 83-703 and 83-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

JOETTE LORION, *Etc., et al.,*
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA,
Petitioners,

v.

JOETTE LORION, *et al.,*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT JOETTE LORION, d/b/a CENTER FOR NUCLEAR RESPONSIBILITY

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QUESTION PRESENTED

Whether a Nuclear Regulatory Commission director's decision made through the ex parte agency process authorized by 10 C.F.R. § 2.206 constitutes a final order entered in a "proceeding" of the kind Congress specified in Section 189 of the Atomic Energy Act of 1954 as appropriate for initial review by the courts of appeals?

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STATEMENT OF THE CASE

> There is a high, increasing likelihood that someday soon, during a seemingly minor malfunction at any of a dozen or more nuclear power plants around the United States, the steel vessel that houses the radioactive core is going to crack like a piece of glass. The result will be a core meltdown, the most serious kind of nuclear accident. . . .

D. L. Basdekas, Reactor Safety Engineer, Nuclear Regulatory Commission.[1]

1. The Nature of the Case and the Issues Presented.

a. The Turkey Point nuclear power plant has one of the most severely embrittled reactor vessels in the United States. For that reason, it is one of the reactors whose pressure vessel is most likely to crack from thermal shock if a minor malfunction requires the use of

1. D. L. Basdekas, "The Risk of a Meltdown," N.Y. Times (Mar. 29, 1982); see also NRC Staff Seeks Additional Information on Pressure Vessel Thermal Shock, Release No. II-81-79 (NRC Office of Public Affairs, Reg. II, Aug. 26, 1981).

standard emergency cooling procedures. A "seemingly minor malfunction" would thus result in the most serious kind of nuclear accident, a meltdown of the radioactive core.

Joette Lorion lives near the Turkey Point plant. When the staff of the Nuclear Regulatory Commission ("NRC" or "Commission") publicly disclosed these facts in 1981, Ms. Lorion asked the Commission to address the problem and, if necessary, suspend the reactor's operating license. That request was promptly denied by a subordinate NRC official in an agency process that relied solely upon ex parte submissions from the plant's owner-licensee and the NRC staff and that excluded Ms. Lorion from any participation.

A case that arose out of a citizen's concerns over a potential nuclear nightmare that threatened her and her neighbors

has become a potential jurisdictional nightmare that threatens all concerned. For almost three years, while the Turkey Point reactor has continued to operate at full capacity housed in an increasingly embrittled pressure vessel, Ms. Lorion has sought a meaningful opportunity to present and have the facts underlying her concerns addressed and resolved. In its effort to justify her exclusion from its decision-making process, the Commission argued that its ex parte agency process was not a "proceeding" of the kind Congress specified in section 189 of the Atomic Energy Act of 1954, 42 U.S.C. § 2239 (1982). In its efforts to restrict judicial review of its decision to the ex parte record submitted by the licensee and the NRC staff, the Commission argues that its ex parte agency process was a "proceeding" of

the kind Congress specified in section 189 of the Atomic Energy Act of 1954.

The Court of Appeals recognized the untenable paradox and resolved it in a manner that respected both the Commission's prerogatives in defining the agency processes appropriate for its own action and Congress's prerogatives in defining the jurisdiction of the courts. Respondent believes the Court of Appeals was correct. She also believes, however, that neither that court nor petitioners here have adequately identified the practical issue that this case presents or analyzed the jurisdictional nightmare that would result if petitioners' contentions here were accepted.

b. The practical issue in this case is not whether administrative decisions such as the one involved in this case should be reviewed in the district

courts; rather the issue is whether they should be screened by the courts of appeal before they get to the district courts. Under the Administrative Orders Review Act (the "Hobbs Act"), 28 U.S.C. §§ 2341 et seq. (1982), the courts of appeals cannot remand a case to the agency and instruct it to hold a hearing or to supplement the record unless the case is one in which the agency process under review constituted "proceedings [in which] a hearing is required by law," id. § 2347(b)(1). They must transfer to the appropriate district court any case that requires review of an agency action for which "a hearing is not required by law and [in which] a genuine issue of material fact is presented," 28 U.S.C. § 2347(b)(3).[2]

2. If there are no genuine issues of material fact and if the court of appeals has jurisdiction, it may, of course, pass upon the merits of the issues presented. 28 U.S.C. § 2347(b)(2).

The Commission and the courts of appeals have consistently held that NRC directors' decisions under 10 C.F.R. § 2.206 are not the product of a 'proceeding', but rather that they constitute ex parte factual determinations for which a hearing is not required by law.[3] As the record here suggests, persons sufficiently aggrieved to seek review of a director's refusal to act will frequently be able to demonstrate that there are genuine issues of material fact and thus that transfer to the appropriate district court is required under the Hobbs Act.

Thus the practical question here is whether section 189 of the Atomic Energy Act of 1954, 42 U.S.C. § 2239 (1982), requires that the courts of appeals screen

3. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), 7 N.R.C. 429, 432-33 (1978), aff'd sub nom., Porter County Chapter of the Izaak Walton League v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

petitions for review from directors' decisions refusing requests to institute licensing proceedings even though a significant proportion of those petitions will have to be transferred to the district courts. Respondent believes that the Court of Appeals correctly applied the plain meaning of that section in determining that, absent further action by Congress, both the initial screening and the required fact-resolution functions should be done by the district courts.

2. The Statutory and Regulatory Framework

a. The Atomic Energy Act of 1954 ("the Act"), as amended, 42 U.S.C. §§ 2011 et seq. (1982), established the statutory framework for the commercial development and regulation of nuclear power. Under the Act, the Commission was assigned regulatory responsibility and authorized and required to adopt rules and regula-

tions and to conduct proceedings for the licensing of nuclear power plants, 42 U.S.C. §§ 2201, 2231-42. Except as otherwise specified in the Act itself, the Commission's rulemaking and licensing proceedings were to be conducted in accordance with the framework established by the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551-59 (1982). 42 U.S.C. § 2231.

In subsection 189(a) of the Act, Congress identified and made specific provision for three kinds of proceedings:

> . . . proceedings . . . for the granting, suspending, revoking, or amending of any license . . ., for the issuance or modification of rules and regulations dealing with the activities of licensees, and . . . for the payment of compensation [for mandatory patent licenses or other actions constituting a "taking"]

42 U.S.C. 2239(a)(1). Congress required that for these kinds of proceedings "the Commission shall grant a hearing upon the

request of any person whose interests may be affected and shall admit any such person as a party to such proceedings" and specified that appropriate prior notice of proceedings with respect to licenses be published in the Federal Register (id.).[4]

Pursuant to that mandate, the Commission has adopted a comprehensive set of rules specifying the procedures to be followed in its licensing and rulemaking proceedings. See 10 C.F.R. Part 2. As

4. Congress specified that no hearing need be held in post-construction licensing proceedings if none were requested. In 1983, Congress further amended section 189(a) to authorize the Commission to issue license amendments without notice and hearing if it had determined that the amendment "involves no significant safety hazards consideration." [Pub. L. No. 97-415, § 12, 45 Stat. 2067 (1981).] The question whether the agency process by which the Commission makes a "no significant safety hazards" determination constitutes a "proceeding of the kind specified" in section 189(a) is not before the Court in this case and should be avoided because the concern it raises differ in significant respects.

required by the Act and by the APA, these proceedings have two characteristics in common. Interested parties must be given adequate notice and, upon demand, a proper opportunity to submit their factual and legal contentions and to proffer evidence relevant to any material issues of fact. In addition, the Commission's rules for licensing proceedings incorporate the traditional safeguards for administrative adjudications (10 C.F.R. §§ 2.100-2.790), including the prohibition against ex parte communications between the decisionmaker and the Commission staff or any other party to the proceeding (10 C.F.R. § 2.780).

These rules assure that the final order in a contested proceeding of either kind will be based upon a record that includes the factual and legal contentions of interested persons. Even if the

Commission determines that there are no genuine issues of material fact, the rules assure the record will include such evidence as those who may be aggrieved by the final order properly proffered. Final orders in proceedings such as those must be based upon a record that is limited to materials that the parties to the proceedings had an opportunity to confront.

Congress determined that appeals from proceedings such as those should be subject to judicial review in the courts of appeals. Specifically, Congress provided in subsection 189(b) of the Act:

> Any final order entered in any proceedings of the kind specified in subsection (a) of this section [189] shall be subject to judicial review in the manner prescribed in [the Hobbs Act, 28 U.S.C. §§ 2341-51] and to the provisions of [the APA, 5 U.S.C. §§ 701-06].

42 U.S.C. § 2239(b).

b. By its rules, the Commission has assigned the power to "initiate a proceeding to modify, suspend or revoke a license" to the directors of the agency's various offices (10 C.F.R. § 2.202). Once such a proceeding has been initiated, the appropriate director and his staff prosecute the action on behalf of the commission and the respondent licensee (and the intervenors, if any) prosecute their respective contentions as parties to the proceedings. The customary procedures for contested licensing adjudications within the Commission must be followed (10 C.F.R. § 2.700), including the prohibitions against ex parte communications or submissions from the staff or any other party to the proceeding to the officials charged with adjudicative responsibility (10 C.F.R. § 2.780).

c. In 1974, twenty years after the Act was adopted and long after the Commission's basic procedural structure had been established, the Commission adopted Rule 2.206, 10 C.F.R. § 2.206.[5] That rule codified a procedure by which a person could request that the director of the appropriate office "institute a proceeding . . . to modify, suspend or revoke a license . . . ." 10 C.F.R. § 2.206(a). The rule does not require that a notice of the request be published and typically the director makes a decision based upon factual materials submitted by the licensee and the staff without further input by the person who made the request.[6] If the director denies the request, he then must advise the party making the request

5. 39 Fed. Reg. 12353 (Apr. 5,1974).

6. See, e.g., Northern Indiana Public Service Co., supra n. 1, 7 N.R.C. 429, 432-33 (for confirmation of authority and description of process).

"that no proceeding will be instituted", id., § 2.206(c). The rule prohibits any appeal from that decision, id., § 2.206(e).

The narrow issue before this Court is whether a director's decision not to institute a proceeding reached through the agency process established by 10 C.F.R. § 2.206 should be construed to be a "final order entered" in a "proceeding of the kind specified" in section 189(a) so as to require that petitions for review be initially screened by a court of appeals to determine whether transfer to a district court is necessary. The director's application of 10 C.F.R. § 2.206 in this case illustrates the concerns that led the Court of Appeals to determine that such a construction was inconsistent with the intended function as well as the statutory language of section 189 and with proper exercise of the judicial review function.

3. NRC Process and Decision

a. In 1981, the NRC identified an unanticipated and serious problem. Radioactive bombardment of a copper alloy used in the weldings in early reactor containment vessels had caused the vessels to embrittle more rapidly than anticipated. That embrittlement created an unanticipated and unevaluated risk that a containment vessel might crack as a result of thermal shock if standard emergency cooling procedures were required to shut the plant down. In re Florida Power and Light Company, (Turkey Point Plant, Unit 4), DD-81-21 (1981)(The "Director's Decision"), reproduced in FPL Pet. App. 16, 23 n. 12; R. Doc. No. 15, Lorion Jt. App. 55-58, 102-03.[7] The problem was such

7. These facts are taken from the Director's Decision (FPL App. 16-25) and from the documents upon which it relied. Copies of those documents were included in the [Footnote continued on next page.]

that in April, 1981, one of the NRC's Safety Engineers took the unusual step of writing the Chairman of the House Subcommittee on Energy and Environmental Affairs to alert him to the severity of the problem. After describing the technical problem, he concluded:

> This compound transient, known as pressurized thermal shock, is capable of catastrophically fracturing a reactor vessel that has been exposed to a neutron fluence corresponding to only a few Full Power Years Equivalent (FPYE) of operation, and has a high copper content of about 0.4% in its walls or welds.
>
> A reactor vessel fracture is one of the most serious accidents a reactor may experience. Depending upon its location and mode,

7. [Continued]

Joint Appendix filed in the court below ("Lorion Jt. App.") and identified by document number in the Certified Index to the Record reproduced in the Joint Appendix filed in this Court (Jt. App. 9-12). The citations in the following text and notes identify the document by number ("R. Doc. No.") and the relevant pages as they were reproduced in the Lorion Joint Appendix ("Lorion Jt. App.").

> it is almost certain to cause a core meltdown with all its public health and safety ramifications. . . .
>
> . . . [I]t is apparent to me that those PWR's [Pressurized Water Reactor] with high copper alloy vessels or welds, that have operated for 4 FPYE must be shut down until this matter is resolved in the technical arena.

Lorion Jt. App., 50, 102-03.[8] The NRC Staff promptly acknowledged that the problem was significant and had not been evaluated. They concluded from the preliminary data available:

> Nonetheless, the possibility of vessel failure . . . cannot be completely ruled out. If an overcooling event such as that at Rancho Seco [Nuclear Power Unit] were to occur, . . . the staff would expect much less than one failure in the current population of reactor vessels. Even for the vessel with worst material properties, the staff would not expect a failure.

Id., at 56. On this basis, the NRC staff recommended that an extensive evaluation program be launched, but concluded that "no immediate licensing actions" were required, id., at 57-59.

By August the NRC staff had identified the Turkey Point Plant, Unit 4 ("Unit 4"), operated by petitioner Florida Power & Light Company ("FPL") as one of eight operating plants most seriously affected by vessel embrittlement (FPL Pet. App. 23-24; R. Doc. No. 20, Lorion Jt. App., 147-50).

On August 21, 1981, the NRC Division of Licensing issued and docketed a formal directive pursuant to its Rule 50.54(f), 10 C.F.R. § 50.54 (R. Doc. 20, Lorion Jt. App. 147-53). According to the directive:

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8. The problem has been described and evaluated in articles prepared for general distribution. See E. Edelson, Thermal Shock--New Nuclear Reactor Safety Hazard?, Popular Science, 55 (June, 1983) (for a non-technical description and summary of reactions from the scientific community).

> On the basis of our independent review, of the plants where neutron irradiation has significantly reduced the fracture toughness of the reactor pressure vessel (RPVs), all plants could survive a severe overcooling event for at least another year of full power operation. However, we believe additional action should be taken now to resolve the long-term problems.
>
> * * *
>
> Based upon current vessel reference and/or system characteristics, we have identified . . . Turkey Point 4 . . . as [one of the] plants from which we require additional information at this time.
>
> * * *
>
> In accordance with 10 CRF 50.54(f) . . ., you [FPL] are requested to submit written statements, signed under oath or affirmation, to enable the Commission to determine whether or not your license should be modified, suspended or revoked. Specifically, you are requested to submit the following information to the NRC within 60 days of the date of this letter.

Id., 147-48. The Commission's Office of Public Affairs announced that such directives had been issued to FPL and seven other reactor licensees, and that announcement precipitated widespread news coverage in the local media.[9]

b. On September 11, 1981, respondent Joette Lorion sent a letter to the Chairman and other members of the Commission expressing concern that FPL was being permitted to continue to operate Unit 4 at full capacity with a seriously embrittled pressure vessel and with 25% of its steam generator tubes plugged[10] in the face of the NRC staff's recognition that each of

9. See NRC Staff Seeks Additional Information on Pressure Vessel Thermal Shock, supra n.1; see also, e.g., M. Toner, "U.S. Reports Possible Flaws in N-Plants: Old Steel 'Vulnerable' at Turkey Point," The Miami Herald, (Sept. 8, 1981) § A, p.1.

10. In September, Unit 4 was shutdown for steam generator inspection. Its steam generators were subsequently replaced. Ms. Lorion acknowledges that the specific concerns she raised with respect to Unit 4's steam generators and tube plugging have become moot at this point.

these conditions created serious and unresolved safety issues (Jt. App. 6-8). She asked them to immediately initiate a license review, to derate the unit, and, if necessary, temporarily suspend the operating license. Id. Unbeknownst to Ms. Lorion, the Commission referred this letter to the Director of its Office of Safety Regulation ("the Director") for disposition under its Rule 2.206 (10 C.F.R. § 2.206) (FPL Pet. App. 17).

The Director reviewed submissions from FPL and his own staff and decided that no proceedings should be instituted with respect to FPL's operating license for Unit 4. On November 5, 1981, the Director notified Ms. Lorion that her letter had been treated as a request under Rule 2.206 that the Director institute proceedings for the suspension or modification of FPL's license pursuant to Rule

2.202, (10 C.F.R. § 2.202) (R. Doc. No. 2, Lorion Jt. App., 3-4).

In the accompanying Director's Decision, the Director acknowledged that both the steam generator tube and reactor vessel integrity were significant problems that had not been resolved (FPL Pet. App. 22-24). The Director concluded that, since inspection of the steam generator tubes was underway, this concern had become largely moot (id., 19).

The Director acknowledged that the N.R.C. staff's site-specific concern over the integrity of the vessel at Unit 4 was such that the Director of the Division of Licensing had issued a Rule 50.54(f) directing FPL to submit statements under oath to enable the Commission to determine whether or not its license should be modified, suspended or revoked, (id. at 23-24; R. Doc. No. 20, Lorion Jt. App.

147-53). Although that directive required a response not later than October 20, 1981, neither the record nor the Director's Decision contained any reference to a response by FPL or any explanation of its absence. The Director simply concluded that no proceeding with respect to the embrittlement question was required (FPL Pet. App. 24). Accordingly, the Director decided that no proceeding would be instituted with respect to FPL's license for Unit 4 (id.).

Although the Commission's rules prohibit any petitions for Commission review of a Director's decision under Rule 2.206, Ms. Lorion promptly advised the Commission that she had not intended her letter to be a formal request under Rule 2.206. More importantly, she informed the Commission that had she known her letter was being so treated, she would have

instructed counsel to submit appropriate documentation to assure that the Director was fully aware of the nature and factual bases for her contentions (R. Doc. Nos. 4 and 5, Lorion Jt. App. 15-17). The Commission, with two members dissenting, subsequently decided not to review the decision on its own motion, and the Commission's Secretary advised Ms. Lorion that the Director's decision had become final agency action on December 11, 1981 (R. Doc. No. 6, id. at 18).

4. The Court of Appeals Proceedings and Decision.

a. Ms. Lorion petitioned the Court of Appeals for review. She claimed that the Director's reliance upon ex parte submissions from his own staff and from the licensee without affording her any notice or opportunity to participate had in the context of this case, constituted

an arbitrary and capricious denial of any meaningful process. Her principal contention was that Rule 2.206 had been applied here (and in other cases) in a manner that precluded meaningful review of directors' decisions [Lorion Br. at 13-25 Lorion v. NRC, No. 81-1132 (D.C. Cir. 1983)]. She also claimed that, in view of her factual contentions and the admitted severity of the two concerns she had raised, the Director's decision to resolve these questions without notice on an ex parte record was arbitrary and capricious and constituted an abuse of discretion (id.).

The Commission and FPL argued that the agency process established by Rule 2.206 did not constitute a 'proceeding' and, thus, that Ms. Lorion was not entitled to the kinds of procedural rights afforded a party to a proceeding under the Act or the APA. According to the Commission: "A

request for an enforcement proceeding is just that--a request. Unless and until granted, it is not a 'proceeding' where the requester has any right to present evidence." NRC Br. at 24-25, Lorion v. NRC. The Commission and FPL also argued that the 547-page ex parte record upon which the Director had acted demonstrated that his decision was correct (id. at 29-31, FPL Br. at 20-24, Lorion v. NRC).

b. These contentions made clear to the Court of Appeals a dilemma that had been created by two parallel and inconsistent lines of decisions. As the Commission argued, the courts of appeals had determined that the agency process authorized by Rule 2.206 was not a 'proceeding' within the meaning of subsection 189(a) in which the Commission was required by law to afford the person making the request a hearing or any of the other rights of a

party to a 'proceeding' (FPL Pet. App. 6-7). In two other cases, however, the Court of Appeals acknowledged that it and the Court of Appeals for the Seventh Circuit had construed the director's decisions under Rule 2.206 to be "final orders" entered in a "proceeding of the kind specified" in subsection 189(a) of the Act as the necessary predicate for direct review by the courts of appeals pursuant to subsection 189(b) (id. at 7-10). The dilemma became apparent in this case because the Court of Appeals was being asked to review a director's decision that acknowledged that the underlying safety concerns Ms. Lorion had raised were serious in which the Director had denied relief on the basis of a 547-page record consisting solely of ex parte submissions by the licensee and the agency staff.

c. The Court of Appeals concluded that it could not properly avoid the restriction Congress had imposed upon that court's jurisdiction when Congress explicitly referenced its use of the word "proceeding" in the jurisdictional grant in subsection 189(b) to the kinds of "proceeding" Congress had specified in subsection 189(a) (FPL Pet. App. 10-12). In the absence of any evidence in the legislative history that Congress had envisioned its jurisdictional grant to extend beyond orders entered in formal hearings (id. at 13), the Court of Appeals concluded that it must defer to the legislative judgment clearly embodied in the language and in the unusual interlocking statutory scheme Congress had employed (id. at 11-13).

The panel recognized that its departure from existing precedent was unusual.

For that reason its opinion meticulously canvassed the principles of statutory construction that this Court and the courts of appeals had applied to infer jurisdiction in order to avoid unnecessary bifurcation of judicial forums in construing more ambiguous schemes in other statutes (id. at 11-12). It concluded, however, that the unusual cross-referencing and interlocking scheme that combined the jurisdictional grant with the specifications of Commission proceedings foreclosed the application of any of these principles (id.). Moreover, the panel took the extraordinary step of having that part of its opinion reviewed and approved by the full court (id. at 14 n.**).

The Court of Appeals acknowedged that the Commission's development of new types of agency action to address emerging problems might require amendments to the

statutory scheme for judicial review (FPL Pet. App. 13-14). The court concluded, however, that established principles of statutory construction and a recognition of the limits of the judicial function committed this issue to Congress (id. at 14-15). Accordingly, the court dismissed the case for want of subject matter jurisdiction and transferred it to the United States Court for the District of Columbia pursuant to 28 U.S.C. § 1631 (1982) (id. at 13, 15).

d. The licensee and the federal petitioners separately petitioned this Court to grant a writ of certiorari to resolve the conflict the decision below had created. Although that request made it certain that consideration of her underlying concerns would be further delayed, respondent Lorion acknowledged that the decision below had created

conflict likely to require action by this Court. Apart from noting that prudential concerns might dictate deferring the question, she did not oppose the petitions. On March 26, 1984, this Court granted the petitions and consolidated the two cases.

SUMMARY OF ARGUMENT

The precise wording and the structure Congress adopted expressed a clear intent to carefully identify the specific kinds of proceedings in which Congress intended the Commission to be bound by the APA procedural requirements for licensing and adjudication. The joinder of that specification with the limitation upon the kinds of proceeding Congress intended to have reviewed by the courts of appeal and the express wording adopted are equally clear. The hearing requirement applies to the kinds of agency proceedings specified

in subsection (a); the jurisdiction of the court of appeals extends to all, but only, the final orders that result from the kinds of proceedings to which the hearing rights attached (see discussion infra, pp. -).

The Court of Appeals understated the support for its conclusion provided in the legislative history. The legislation as initially proposed specified in section 181 that the APA was applicable to all 'agency acts'. The primary review mechanism was to be a Review Board within the Commission. The language of the grant of jurisdiction to the courts of appeals constituted section 189 and was identical, a relevant part, the jurisdictional grant that had been included in the Federal Communications Act of 1930. See discussion infra, pp. - , and .

After extended hearings, these proposals were extensively modified. The revised bills added a requirement to section 181 that would have required that the Commission "grant a hearing to any person materially interested in any 'agency action'." The Review Board has eliminated and the jurisdictional grant was limited to final orders in licensing and rulemaking proceedings. The identical reports that accompanied the bill in each house made it clear that section 181 had been amended to extend the APA's administrative hearing procedures to all "agency actions," while the jurisdictional grant in section 189, as modified, extended only to "certain agency actions." See discussion infra, pp. - .

The conflicting contentions were settled late in the legislative process. On July 14, 1954, the Vice Chairman of the

Joint Committee on Atomic Energy, Senator Hickenlooper, filed two proposed amendments in the Senate--one amending proposed section 181; the other amending proposed section 189. The hearing requirement was deleted entirely from section 181. A new hearing requirement, the hearing requirement ultimately adopted, was added to section 189 as a new subsection (a). The jurisdictional grant to the courts of appeal was amended to substantiate its present language and was reincorporated as subsection (b).

The colloquy between Senator Hickenlooper and Senator Pastore, also a member of the Joint Committee, took place two days later. Senator Hickenlooper advised his colleagues that the hearing requirement had been moved from section 181 and amended to "clearly specify the types of Commission activities in which a hearing

is to be required," while the jurisdiction grant had been reincorporated in subsection (b) and altered to "clarify the intent of Congress with respect to the applicability of [the Hobbs Act]." Senator Pastore offered the further explanation: "The amendment limits the provisions to hearings on licenses in which a review shall take palce." Senator Hickenlooper reaffirmed that interpretation and the amendment was immediately adopted. Respondent found petitioners presentation of the legislative sufficiently misleading to justify a rather full presentation of the evidence. See discussion infra, pp. -).

The construction of section 189 adopted by the Court of Appeals reached the only result consistent with the language and purpose of the Hobbs Act. The application of the Hobbs Act's provi-

sions do not permit a court of appeals to remand to the agency a case in which a hearing is not required by law. The provisions codified at 42 U.S.C. § 2347(b) will require that the Court of Appeals transfer any appeal in which the petitioner can show, by pleading or affidavit, that there is a genuine issue of material fact. See discussion, infra, pp. - .

Against this background, petitioners contentions and the respective positions of the parties in this Court are reminiscent of the Court's somewhat whimsical remonstrance in Vermont Yankee-Nuclear Power Corporation v. NRDC, 435 U.S. 519, 539-40 and n.15. Petitioners' contentions have made it this time on ironic "quadrille." Respondent submits thatit is petitioners here, rather than the court below, who have seriously "misread or misapplied [the] statutory and decisional

framework" that this Court forcefully affirmed in Vermont Yankee. See discussion, infra pp. - .

To achieve a result in this case, petitioners ask the Court to construe section 189 as if it contained the wording that Congress considered and rejected. They ask this Court to construe the Hobbs Act as if 28 U.S.C. § 2347(b)(3) had not been adopted and read into that statute an implied power that will enable, nay compel, the Court of Appeals to impose its own notion of proper proceedings upon the commission's Rule 2.206 agency process. They ask this Court to equate the agency process here with agency proceedings in which a hearing is required by the law of administrative procedure but need not be held if the law of adjudication permits summary disposition. See discussion infra, pp. - .

Petitioners suggest speculative concerns over the possible bifurcation of review that might result from the lower courts' decision as a ground upon which they ask this Court to construe the Act in a manner that must result in the trifurcation of review and that ignores the respective competence of the courts of appeal and the district courts. This they ask, even though it seemingly lies within the agency's power to avoid the problems entirely by incorporating a right of intra-agency appeal on to its Rule 2.206 process, and lies with Congress's prerogatives to determine whether the agency process the Commission has developed for the 1980's requires further amendment to the 1954 legislative chapter. Respondent submits, simply, that petitioners argue against this Court's decision in Vermont Yankee, and that is what makes the quad-

rille ironic for respondent. See discussion infra, pp. - .

The agency process permitted by Rule 2.206 has evolved substantially since its adoption in 1974. At the outset, the Commission apparently thought it was a necessary process to provide a vehicle by which new matters raising significant health or safety issues might be brought to its attention. As originally formulated, Commission policy required notice of all but the most frivolous requests be published. So too, a person aggrieved by a director's denial of a request could petition the Full Commission for review. See discussion infra, pp. - The Commission has retreated steadily from those policies. In 1977, the Commission amended the Rule to prohibit the filing of petitions for review within the agency. In 1978, the Commission construed its own

statutory mandate and declared that the agency process authorized by Rule 2.206 was not a "proceeding" within the meaning of Section 189(a) and thus that persons making requests could properly be excluded. See discussion infra, pp. - .

Since 1979, the trend has accelerated. Following the events at Three Mile Island, the concerns and the number of people who hold them, increased dramatically as did the number of requests submitted. The agency process also changed, the publication of notices became at best sporadic, and director's decisions were accurately and officially known as "Directors Denials." It was during this period, that the jurisprudence of Rule 2.206 developed along conflicting lines. The Commission argued persistently and successfully that the exclusion of persons

making the request from the agency process was justified because the process was not a proceeding. The Commission also argued persistently and successfully that its directors' selectively constructed ex parte records foreclosed the courts of appeal from identifying any abuse of discretion. See discussion infra, pp.

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The anomaly became apparent in this case and made it plain the paradox had to be resolved. The same concerns that motivated Ms. Lorion had divided the NRC staff. All agreed that the unanticipated embrittlement coupled with the rather high probability of malfunctions requiring cooling procedures that would produce thermal shock enhanced the probability of a core meltdown accident. The problem was that formal consideration was not and has not been given to determining how

serious the embrittlement was at specific reactors or what probabilities should be used. See discussion infra, pp. -

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The specific concerns raised by Ms. Lorion make the need for a decision clear. The NRC licensing division acknowledged they were so serious that site specific information was required from FPL. The staff acknowledged they lacked generic data sufficient to enable it to reach a firm probability judgment. In that record here, the Director determined that he did not even need to see FPL's response before he denied respondent's request. And it was on this record that the Commission argued that it had not abused its discretion or acted arbitrarily and capriciously. And that it is the record that the Court of Appeals had and that this Court has before it to determine in what

forum respondent should have the factual contentions that she presented to the NRC resolved. That record illustrates the "practical concerns" that should motivate this Court. That record makes clear that the correct forum, so long as the agency retains its present process and absent legislative action, is the district court. See discussion infra, pp. - .

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT: THE AGENCY PROCESS BY WHICH DIRECTORS DECIDE NOT TO INSTITUTE PROCEEDINGS DOES NOT ITSELF CONSTITUTE A PROCEEDING OF THE KIND SPECIFIED IN SECTION 189 OF THE ATOMIC ENERGY ACT.

A. The language, structure, and legislative history of section 189 make it clear that Congress intended that the courts of appeal have jurisdiction to review only those final orders that resulted from "rulemaking" or "licensing" "proceedings" as those terms are used in the Administrative Procedure Act.

1. The technical issue that must be resolved in this case emerges from the

language Congress used in Section 189 of the Act:

> (a)(1) In any proceeding under this chapter for the granting, suspending, revoking, or amending of any license or construction permit, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding . . . .

42 U.S.C. § 2339.[11] The Commission has consistently and successfully maintained that the agency process authorized by Rule 2.206, 10 C.F.R. § 2.206, does not constitute a "proceeding" of the kind specified in subsection 189(a) in which they would be required to admit the person

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11. Section 189(a) also specifies procedural requirements for rulemaking proceedings dealing with the activities of licensees and for certain compensation proceedings authorized or required under the Act. Petitioners here have acknowledged that, if the agency process authorized by Rule 2.206 is a proceeding at all, it can only be a "proceeding for the suspending, revoking, or amending" of the license.

making the request as a party and in which they would be required to grant that person the procedural rights mandated by the Act, by the APA, or by its own rules for such proceedings. Thus, the technical issue presented is whether Congress intended the term "proceeding" in section 189(b) to encompass agency process that would not fall within the term "proceeding" as Congress used it in section 189(a) or as Congress had defined it in the APA, 5 U.S.C. § 551(12)? The Court of Appeals found it had not.

The Court of Appeals was clearly correct in rejecting the strained construction petitioners urge here. The plain language of the jurisdictional grant, the interlocking structure of that section and its relation to the Act's other provisions governing "Judicial Review and Administrative Procedure" (42

U.S.C. §§ 2231-42), and its legislative history support the conclusions that Congress intended to restrict the jurisdiction of the courts of appeals to final orders entered in the kinds of proceedings specified in section 189(a). Those were precisely the kinds of proceedings that would generate a record suitable for direct review in the courts of appeal. The language of the Hobbs Act reinforces this conclusion because this is not a case in which a court of appeals, assuming jurisdiction, could remand to the agency for a hearing. 28 U.S.C. § 2347(b). Collectively, these factors combine to compel the conclusion that the Court of Appeals correctly found no evidence sufficient to support an inference that Congress intended the courts to depart from the plain meaning of the words Congress chose.

2. The language of the Act makes it clear that Congress understood the distinction between "licensing" and "rulemaking" "proceedings" on the one hand and other forms of "agency action" on the other. Section 181 of the Act makes the provisions of the APA governing administrative procedure [5 U.S.C. §§ 551-59] and judicial review (id., §§ 701-06) applicable "to agency action taken under this chapter" and expressly provides that "the terms 'agency' and 'agency action' shall have the meaning specified in [5 U.S.C. § 552]." 42 U.S.C. § 2231.[12] In that same section Congress recognized that the term "agency action" embraced more than just "agency proceedings": It excluded from the application of the APA "the case of agency proceedings or actions" that involved defense information or other restricted data. Id.; emphasis added.

Sections 182 through 187, 42 U.S.C. §§ 2232-37, address the conditions under which licenses and construction permits

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12. The definitions in the APA make it clear that the term "agency action" embraces far more than orders entered in "agency proceedings." Under the APA, the term "agency proceedings" is defined as a limiting term: it includes three, and only three kinds of agency process -- rulemaking, licensing, and ajudication. 5 U.S.C. § 551(12). "Agency action" is defined as an inclusive term: it includes all actions granting or denying relief as well as refusal to act. Indeed, the

[Footnote continued on next page.]

12. (Continued)

principal function of the APA was to prescribe the procedural requirements that agencies must observe in rulemaking, licensing, and adjudicative proceedings while preserving their flexibility to develop other forms of agency process to address other problems as they emerged. Petitioners here, of course, are implicitly inviting this Court to retreat from its decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (courts may not impose procedural requirements upon agency decisionmaking processes in excess of those required by APA). They ask this Court to authorize the Court of Appeals to remand to the agency for a hearing an agency action for which no hearing is required under the APA.

are to be granted, revoked, and modified. Section 188, id. § 2238, makes provisions for the Commission to order the continued operation of facilities whose license has been revoked and provides that just compensation be paid for the public use.

Section 189 then establishes in subsection (a) the framework within which the Commission is to conduct the necessary licensing proceedings, rulemaking proceedings with respect to "the activities of licensees", and proceedings for compensation adjudications,[13] and prescribes in subsection (b) that the resulting orders from proceedings of the kind specified in subsection (a) shall be reviewed in the courts of appeals. Id. § 2239.

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13. The three sections that have been added since the Act was originally adopted are consistent with this pattern. They make provisions for the establishment of the Atomic Safety and Licensing Boards, the use of license incident reports as evidence in court proceedings, and the issuance of temporary operating licenses. 42 U.S.C. §§ 2240-42.

3. The legislative history simply reinforces the clear intent of the language and structure of section 189 and the Act's other provisions governing administrative procedure and judicial review of Commission proceedings. In April, 1954, a comprehensive proposal to amend the Atomic Energy Act of 1946, as amended, was introduced in both Houses of Congress. Joint Committee on Atomic Energy, (the "Joint Committee"), A Proposed Act to Amend the Atomic Energy Act of 1946 (Jt. Comm. Print, April, 1954), reproduced in I Legislative History of the Atomic Energy Act of 1954, 53-104 (Atomic Energy Commission 1955) [hereinafter "Leg. His."]; identical proposals introduced as H.R. 8862 (Apr. 15, 1954), I Leg. Hist. 105-79, and S. 3323 (Apr. 19, 1954), id., 181-255.

The original language of the proposed section 181 made the provisions of the APA

applicable "to all 'agency acts'" and required that the "full regular administrative procedures" were to be followed (unless national security or like concerns required otherwise). H.R. 8862, § 181, I Leg. Hist. 161-62; S. 3323, § 181, id. 237-38. Under section 188 of that proposal, a separate Review Board was established as the adjudicative body within the Commission with authority to review any "action" of the Commission in precisely the same kinds of proceedings now specified in section 189(a) of the Act. H.R. 8862, § 188, I Leg. Hist. 166-67, S. 3323, § 188, id. 242-43. Proposed section 189 contained only a broad grant of jurisdiction to the courts of appeal:

> Any proceeding to enjoin, set aside, annul or suspend any order of the Commission shall be brought as provided in the [Hobbs Act]

and authorized the Commission itself to appeal from adverse decisions of the Review Board. H.R. 8862 §§ 181, 189, reproduced in I Leg. Hist. 161-62, 167-68; S. 3323 §§ 181-189, reproduced id. 237-38, 243-44.

The Joint Committee held hearings in May, 1954.[14] In late May, the Joint Committee issued proposed revisions to the pending bills. The revisions eliminated the Review Boards and revised section 189 to provide:

> Any final order granting, denying, suspending, revoking, modifying, or rescinding any license . . ., or any final order issuing or modifying rules and regulations dealing with the activities of licensees entered in an agency action of the Commission shall be subject to judi-

14. Joint Committee, Hearings on S. 3323 and H.R. 8862 ["Hearings"]; Pt. I (Comm. Print. 1954), reproduced in II Leg. Hist., 1629-2194. Those hearings indicate that there was concern over the use of a review board, but otherwise offered little indication of the Committee's thinking. Id., at 1924.

> cial review in the manner prescribed in the [Hobbs Act] . . . and to the scope of review and the other remedies provided by section 10 of the Administrative Procedure Act [of 1946, Pub. L. No. 79-404 § 10. 60 Stat. 237, 243-44 (1946)].

See Joint Committee, Comparative Print of Committee Print Revise on H.R. 8862 and S. 3323 Compared with the Atomic Energy Act of 1946 ["Comparative Print"], § 189, I Leg. Hist. 351, 509-11. On June 30, 1954, following further hearings by the Joint Committee,[15] identical revised bills approved by the Joint Committee were introducted in the House and Senate. H.R. 9757, reproduced in I Leg. Hist. 541 (replacing H.R. 8862) and S. 3690, id. 654 (replacing S. 3323).

The provisions governing administrative procedure and judicial review in the two bills were the same as those in

15. Hearings, Pt. II, reproduced in II Leg. Hist. 2197-2795.

the Joint Committee's May proposal with two exceptions. Proposed section 181 had been amended by adding the provision, "Upon application, the Commission shall grant a hearing to any party materially interested in any 'agency action.'". H.R. 9757, § 181 (as introduced June 30, 1954), I Leg. Hist. 541, 625; S. 3690, § 181 (as introduced June 30, 1954), id. 645, 628. Second, proposed section 189 had been altered only by the insertion of single quotation marks around the words "agency action." id. at 631 and 733.

The Senate Bill, S. 3690, was accompanied by a report filed by Senator Hickenlooper Vice Chairman of the Joint Committee. S. Rep. No. 1699, reproduced in I Leg. Hist. 749. That report identified both the apparent intent of Congress and a potential conflict in the language of the bill as drafted.

> Section 181 makes the provisions of the Administrative Procedure Act applicable to all agency actions of the Commission. . . . The Commission is required to grant a hearing to any party materially interested in any agency action.
>
> * * *
>
> Section 189 provides for judicial review of a final order of the Commission entered in certain agency actions . . . .

S. Rep. No. 1699, at 28-29, I Leg. Hist. at 776-77; emphasis supplied. See also H. Rep. No. 2121, 28-29 (July 12, 1954), reproduced in I Leg. Hist. 997, 1024-25 [containing the same comment on proposed sections 181 and 189 in H.R. 9757 (as reported July 12, 1954), id. 893, 976-97, 983].

On July 14, 1954, Senator Hickenlooper, the Vice Chairman of the Joint Committee on Atomic Energy, filed proposed amendments to section 181 and to section 189 to resolve that conflict. Under the amend-

ments, section 181 was amended in two ways. The first sentence was to be amended to clarify Congress's intent that the provisions of the APA should apply to "all agency action taken under the Act" and to make clear that "the terms 'agency' and 'agency action' shall have the meaning specified" in the APA. Second, the requirement that "the Commission shall grant a hearing to any party materially interested in any agency action" was removed from that section.

The proposed amendment to section 189 restructured that provision and cast it in substantially the form in which it was ultimately adopted. The section was divided into its two subsections. The hearing requirement and the kinds of proceedings to which it applied were inserted as subsection a; and the grant of jurisdiction to the court of appeals was

rewritten to specify precisely which "certain agency actions" were included.

The proposed amendments provided in relevant part:

> Sec. 181. GENERAL--The provisions of the Administrative Procedure Act [of 1946] shall apply to all agency action taken under this Act, and the terms "agency" and "agency action" shall have the meaning specified in the Administrative Procedure Act: * * *

S. 3690: Amendment [section 181], reproduced in I Leg. Hist. 1149.

> Sec. 189. HEARINGS AND JUDICIAL REVIEW--
>
> a. In any proceedings under this Act for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceedings for the issuance of modification of rules and regulations dealing with the activities of licensees, and in any proceeding . . . [for the payment of various specified types], the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

> b. Any final order entered in any proceeding of the kind specified in subsection a. above entered in an "agency action" of the Commission shall be subject to judicial review in the manner prescribed in the [Hobbs Act] and to the provisions of section 10 of the Administrative Procedure Act, as amended.

S. 3690: Amendment [section 189], reproduced in I Leg. Hist. 1145-46.

Against this background, the colloquy between Senator Hickenlooper and Senator Pastore, also a member of the Joint Committee, on July 16, 1954, is clear. After introducing the proposed amendment to section 189, Senator Hickenlooper explained

> MR. HICKENLOOPER. . . . this section reincorporates the provisions of hearings formerly made part of section 181, but clearly specifies the types of Commission activities in which a hearing is to be required. The purpose of this revision is to specify clearly the circumstance in which a hearing is to be held. This section also reincorporates the former provisions of section 189 dealing with

judicial review. There is a slight change in the wording to clarify the intent of Congress with respect to the intent of the applicability of [the Hobbs Act] and the applicability of [the judicial review provision of the then APA].

* * *

MR. PASTORE. As a matter of fact, referring to the bill S. 3690, as reported, [the provision of section 181 as set forth at I Leg. Hist. 728-29] the bill refers to "agency action". That wording was thought to be broad, broader than it was intended to make it. The amendment limits the provision to hearings on licenses in which a review shall take place.

MR. HICKENLOOPER. The Senator from Rhode Island is correct.

. . .

100 Cong. Rec. 10171, reproduced in III Leg. Hist. 3175; emphasis added. Whereupon the amendment was agreed to, id. The Act as finally adopted clarified the meaning further by limiting the applicability of subsection b. to orders "entered in a proceeding of the kind specified in

subsection (a) of this section" and by deleting the words "entered in an agency action of the Commission." Section 189(b) of the Act, Pub. L. No. 83-703, 189(b), 68 Stat. 919 (1945), reproduced in I Leg. Hist. 1, 37-38.

The evidence of Congress's intent makes it clear that it intended the APA to apply to "all agency actions," but it intended review by the courts of appeals to be limited to "certain agency actions." In that context, only one interpretation of the amendments that produced the final version and the colloquy between Senators Hickenlooper and Pastore is consistent with that evidence. The hearing requirement for "all agency actions" was deleted from draft section 181 because it was too broad. Section 189 was amended to specify in subsection (a) those "certain agency actions" in which a hearing was to be

required by law, and the jurisdictional grant was amended and reincorporated as subsection (b) to make it clear that the certain agency actions for which a hearing was required by law were precisely the same as the "certain agency actions" that Congress intended to have reviewed in the courts of appeals.

The Court of Appeals below reviewed this evidence meticulously and concluded that there was no evidence in the sparse legislative history to suggest Congress intended to grant the courts of appeals jurisidiction that extended beyond the precise and plainly expressed jurisdictional grant embodied in the words and the unusual interlocking structure of the statutory grant itself (FPL Pet. App. 12-13). Respondent submits that, if anything, the Court of Appeals understated the conclusion. What evidence there is

affirmatively supports the lower court's construction, and petitioners' attempts to suggest otherwise seem disingenuous at best (see Br. Fed. Pet., 24-28; see also FPL Br., 17 n.13). Moreover, that construction is the only construction that produces a result consistent with the purposes Congress sought to achieve and the statutory framework it created when it adopted the Administrative Orders Review Act (Hobbs Act), 28 U.S.C. §§ 2341, et seq., in 1950.

4. The Hobbs Act was a precise statute adopted after long study to address a specific set of problems. H.R. Rep. No. 2618, reproduced in [and hereinafter cited to] 1950 U.S.Code Cong. Serv. 4303-06. By the Urgent Deficiences Act of 1913, Congress had identified certain agency orders as sufficiently important to require special provision for judicial

review, id., 4304. The Urgent Deficiences Act provided for review by special three-judge district courts with a right of appeal directly to this Court, id. For many of these agency actions, the person challenging the action was entitled to a de novo trial before a three-judge court, id., 4305.

By the early 1940's, it had become clear to most observers that the use of three-judge panels to perform a task ordinarily better done by a single judge was a wasteful and inappropriate use of judicial resources, id., 4304-06. So too, Chief Justice Stone and others had complained that the right of direct appeal had forced this Court to devote substantial time to what seemed to be an early judicial version of 'trivial pursuits', id., 4304. These nearly unanimous expressions of concern were insufficient to move

Congress, however, until after it had adopted the APA in 1946.

The procedural requirements imposed by the APA satisfied Congress that for most of the agencies whose orders were covered by the Hobbs Act, "the record before the agencies will be made in such a way that all questions for the determination of the courts on review, and the facts bearing upon them, will be presented and the rights of the parties will be fully protected." Id., 4306. Congress recognized explicitly that this would not always be true. For example, Congress recognized that it had not limited the jurisdiction of the courts of appeals to "certain agency actions" of the Federal Communications Commission.[16] The broad

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16. H.R. Rep. No. 2618, 50 U.S. Code Cong. Serv. 4304; see also 28 U.S.C. § 2342(1) and 47 U.S.C. § 407(a) (courts of appeals granted exclusive jurisdiction in

[Footnote continued on next page.]

grant of jurisdiction with respect to that agency and the evolving nature of agency process made it clear to Congress even then that petitions would be filed in the courts of appeals asking them to review agency actions for which "a suitable hearing was not held" in the agency itself. Id., 4306. Congress expressly included what Congress determined was "adequate provision . . . for the taking of evidence either in the agency or the district courts" in those cases. Id; see also 28 U.S.C. § 2347(b) and (c) (for codification of provisions Congress deemed adequate).

Under those provisions, it is clear Congress did not intend or authorize the

16. (Continued)

"any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealed to [Court of Appeals for the District of Columbia])).

courts of appeals to remand to the agency petitions seeking review of the kind of agency process challenged here. Where a hearing has not been held in fact and where the court of appeals determines that a hearing was not required by law, the court of appeals has only two choices. If, but only if, the person seeking relief is unable to establish, by pleading or affidavit, that any genuine issue of material fact is presented, then and only then, the court of appeals must pass upon the issues of law presented. 28 U.S.C. § 2347(b)(2).[17] But if a genuine issue of material fact is presented, then the court

17. As the record compiled in response to Ms. Lorion's two-page letter demonstrates, the substantial factual issues must often be resolved when serious safety concerns are raised by a person seeking relief under Rule 2.206. Future concerned citizens and their counsel should regularly be able to demonstrate the existence of one genuine issue of material fact and thereby satisfy the pleading requirement necessary to compel transfer to the district court. See discussion, infra.

of appeals must transfer the proceedings to a "district court for the district in which the petitioner [here Ms. Lorion] resides . . . for a hearing and determination as if the proceeding were originally initiated in that court . . . [and under the procedures established] by the Federal Rules of Civil Procedure." Id., § 2347(b)(3). The Congressional determination is clear and explicit and does not authorize remand to the agency.[18]

Against this background, petitioners' contentions are truly exceptionable.

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18. The provisions of 28 U.S.C. § 2347(c) authorize remand to the agency where a party to the proceeding petitions the court of appeals for this relief and shows that his or her failure to adduce the evidence in the agency proceeding was excusable. Implicitly and structurally that subsection applies only to proceedings in which the agency held a hearing (or was authorized by law to hold one) and requires that one of the parties seek interlocutory relief. It is not applicable here.

B. The Court of Appeals construed Section 189 in a manner that respects the jurisdictional scheme Congress prescribed in the Administrative Orders Review Act and that respects the Commission's determination that Rule 2.206 provides an adequate and appropriate kind of agency process for making decisions such as the one made in this case.

Petitioners developed four lines of argument. Each is flawed, and the flaws build upon one another to suggest a result whose logical and practical consequences differ dramatically from those petitioners suggest. Respondent suggests that here it is the federal petitioners, rather than the court below, who have "seriously misread and misapplied [the] statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." Vermont Yankee, supra, 435 U.S. 519, 525. Respondent submits that petitioners have

gone further still. In their zeal to win the day, they have sought to persuade this Court to intrude upon Congress's prerogatives in order to engraft petitioners' notions of how the jurisdictional grant expressed in the Act should have been written. Respondent submits, however, that petitioners themselves are likely to be uncomfortable with practical consequences that must logically flow from the decision they ask this Court to make. The bases for respondent's analysis follows:

1. Petitioners contend that Congress patterned the jurisdictional grant in section 189 upon the jurisdictional grant embodied in the Federal Communications Act of 1934, 47 U.S.C. § 402(a) ["§ 402(a)"]. (Br. Fed. Pet., pp. 28-33; cf. FPL Br., p. 30). From this they ask this Court to infer that Congress intended section 189 to be applied in the same manner and to so

apply it, citing this Court's recent decision in FCC v. ITT, 104 S.Ct. 1936 (1984), id.

Petitioners are partly correct: The jurisdictional grant the Joint Committee initially proposed copied the language of section 402(a) in every relevant aspect. Compare H.R. 8862, § 189, quoted supra p. 52 , with § 402(a). The subsequent legislative history, however, establishes one conclusion to a rare degree of certainty: Congress rejected the language and with it the pattern. The Joint Committee's first major revision made it clear that they had concluded that the APA was to apply to "all agency actions", but that the jurisdiction of the courts of appeal was to extend only to "certain agency actions" (see discussion supra pp. 58-60). The ambiguity that remained was removed when Congress limited the APA hearing require-

ment to "certain agency actions" and specified in the same section that it was the final orders that emerged from the kind of "certain agency actions" for which Congress had imposed the hearing requirement (see discussion supra, pp. 60 - 61).

Petitioners ask this Court to hold that Congress intended to adopt the very language it deleted from the statute and, thus, that its repeated deliberations and amendments were meaningless. Respondent had not understood this to be an option open to the courts under this Court's decisional jurisprudence. Respondent submits that such a construction would constitute an explicit invitation to the lower courts to exercise their creative powers to identify tenuous bases upon which to engraft their own notions of the proper scope of their own jurisdiction. Here an oft-divided and sometimes criti-

cized Court of Appeals unanimously rejected the invitation, and correctly so.

2. Petitioners contend that the language of the Hobbs Act, the purpose for which it was adopted, and this Court's decisions support the conclusion that the Court of Appeals erred (Br. Fed. Pet., pp. 28-33; cf. FPL Br., pp. 22-23, 30). To support that result, petitioners ask this Court to repeal one subsection of that statute and to turn occasional dicta into a holding that would permit the Court of Appeals to "impose its own notions of proper procedures upon agencies entrusted with substantive functions." Compare Vermont Yankee, 435 U.S. 519, 525.

The courts of appeals have consistently and uniformly upheld the Commission's position that agency process authorized by Rule 2.206 is not one for which a hearing is required by law. In

that circumstance, the language of the Hobbs Act is mandatory: if the pleadings in the court of appeals identify a genuine issue of material fact, the court of appeals "shall . . . transfer the proceedings to the district court." 28 U.S.C. 2347(b)(3). See discussion supra pp.).

The petitioners seek to avoid this disingenuously. See Br. Fed. Pet. PP. 15, 30-31; cf. FPL Br. 30. The Federal Petitioners note that "when a hearing is required by law or when a party wishes to adduce additional evidence," the Act provides for a remand to the agency" [Br. Fed. Pet., p. 31, citing 28 U.S.C. § 2347(b)(1) and (c) emphasis in original]. This case does not fall and cannot be brought within the terms of either subsection.

The Federal Petitioners compound the obfuscation by noting that the Hobbs Act has been regularly applied to review agency actions when no hearing in fact has been held. See, e.g., Br. Fed. Pet. 12-17. The are perfectly correct; they simply ignore the distinctions between those "proceedings" to which hearing rights attach and agency actions taken by other forms of agency process. No agency need hold a hearing if the person seeking it lacks the administrative equivalent of standing (id., p. 13) or if the contentions presented are not within the agency's subject matter jurisdiction (id.) or if they fail to state a claim upon which relief can be granted (id.) or if the record before the decisionmaker demonstrates there are no genuine issues of fact (id.). These propositions are as unexceptional as they are irrelevant.

The determination whether a "hearing is required by law" for a particular agency is a simple two-step process. The reviewing court first must determine whether the agency action was the kind of licensing, adjudication, or rulemaking proceeding for which the agency's underlying statute or the APA requires that the opportunity to be heard comport with the procedures legislatively prescribed. If it is such a proceedings, in law, and no hearing was held, in fact, the court must further determine whether law applicable to the proceeding justified the agency decision to act without a hearing. But the hallmark of all these proceedings is that a person whose rights may be affected has prescribed procedural rights and upon a proper showing must be permitted to participate in the agency process. The records that result from 'proceedings'

such as these are comprised of the materials the aggrieved parties had an opportunity to submit and to confront.

The decisions of this Court upon which petitioners rely were made in cases in which the party aggrieved had simply failed to satisfy the second step of the analyses. Although the agency process was a proceeding for which participatory rights were specified by law, the agency acted pursuant to law in not holding a hearing in fact. Here the agency process does not satisfy the first step: it is not a proceeding, the person submitting the request has no right to confront the record, and the action is based upon ex parte submissions by other persons whose interests may be affected. The final decision was made by a subordinate non-adjucatory official. The Rule prohibits the aggrieved party from seeking review within the agency.

3. Petitioners also contend that the Court of Appeals decision threatens inappropriate bifurcation of review that is inconsistent with the purposes of the Hobbs Act and the policy of conserving scarce judicial resources (Br. Fed. Pet., pp. 34-39); FPL Br., pp. 22-26). Petitioners' speculations are not supported by logic or experience. Under the Hobbs Act, the exercise of jurisdiction by the courts of appeal is likely to result in trifurcation of review--from the Director to the court of appeals to the district court to the court of appeals to this Court. Moreover, the result petitioners ask this Court to impose respects neither the competence of the courts of appeal nor that of the district courts.

Directors' decisions are decisions of subordinate agency officials. The Commission has decided that the appropriate

agency process should prohibit the person aggrieved from seeking any review within the agency, 10 C.F.R. § 2.206(c) and discussion infra. The directors' decisions usually constitute factural determinations made on an ex parte record concerning site specific concerns that will affect the community in which the reactor is located. See discussion infra. To suggest that subordinate agency officials should hold a power to make ex parte factual determinations and thereby compel a panel of three circuit judges to compare, in the first instance, the pleading and affidavits with the ex parte record to determine whether any genuine issue to be resolved does not respect either the competency or the limited resources of those courts. See discussion infra.

To the extent the Commission is correct in its perception that Rule 2.206

requests do not frequently raise significant issues, and precisely to that extent, the screening function as well as the record development function should be assigned where the Court of Appeals' decision placed it: on a single judge in the district where the persons affected reside. The judicial load will thus be distributed, the chaff will be efficiently discarded, and only ripe wheat is likely to come before the courts of appeal.

4. Finally, petitioners invite this Court to authorize the courts of appeals to intrude again upon an agency's process when that intrusion is neither necessary nor appropriate. If petitioners are correct and the Court of Appeals has the authority to remand a case to the agency for further proceedings where a hearing was not required by law, then the Court of Appeals has the authority to impose upon

the agency that court's notion of what constitutes a proper record and a proper process. Respondent had understood this Court to have rejected a similar contention in Vermont Yankee, 435 U.S. 519-25.[19]

In the context of this case, the invitation is as needless as it is inappropriate. If the Commission is in fact concerned about multiple layers of review, it has the power to redefine its process to convert it into a proceeding of the kind specified in Rule 2.206. The simple expedient of granting persons in the position of Ms. Lorion the right to appeal to the Atomic Safety and Licensing Board or to the Atomic Safety and Licensing Appeal Board would seemingly satisfy the proceeding requirement and the purpose for which it was imposed. An adjudicative

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19. Respondent and those who share her concerns would in fact be relieved to learn that their understanding of the import of that decision was incorrect.

body within the agency would screen the contentions, identify the issues, require an appropriate record, and express the agency's decision with a full awareness of an appropriate record, and express the agency's decision with a full awareness of the competing views. Such an order would be appropriate for review by the courts of appeals.

So too, if the Commission concludes that its regulatory needs in 1984 require that it continue the Rule 2.206 process in its present form and if petitioners' speculative concerns prove to be accurate, it may well be necessary for Congress to revisit the legislative decisions it made in 1954 when it enacted section 189 in its final form and settled the contentions that divided those who would have imposed a hearing requirement upon all agency

actions from those who sought a less restrictive mandate. But if those contentions are to be reopened it should be in the halls of Congress, not in the chambers of the courts.

Respondent was tempted to leave petitioners where their arguments have taken them; but the underlying concerns are too important. A proper understanding of the issues here requires an understanding of the evolution of Rule 2.206 and of the manner in which its application has changed over time, and of its application here. To that petitioner now turns.

II. THE TRUE PRACTICAL CONCERNS IN THIS CASE MAKE IT CLEAR THAT THE DISTRICT COURTS ARE THE FORUM IN WHICH THIS CASE SHOULD PROCEED

A. The Commission must accept the jurisdictional consequences that follow from the manner in which it has defined and applied the Rule 2.206 process.

Commission Rule 2.206, 10 C.F.R. § 2.206, was first published on April 1,

1974, (39 Fed. Reg. 12353). It established a procedure by which interested persons could request a show cause order be issued pursuant to Rule 2.206. 10 C.F.R. § 2.202. Rule 2.206 provided:

> § 2.206 Requests for action under this subpart.
>
> (a) Any person may file a request for the Director of Regulation to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper. * * * The requests shall specify the action requested and set forth the facts that constitute the basis for the request.
>
> (b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of Regulation shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to his request, and the reasons therefor.

The avowed purpose for the amendment comprising the new Rule 2.206 was "to

provide a procedure for submittal of such requests to the "Director of Regulation." Prior to the adoption of 10 C.F.R. 2.206, requests for action to the Commission were not precluded although no specific provision existed therefore. [See Consumer Power Company (Midland Plant) (Units 1 and 2) 6 A.E.C. 1082 (1973) where prior to enactment of Rule 2.206 petitioners filed an "Emergency Petition" seeking to set aside "illegal action."]

Following its promulgation, the Rule was modified twice, first on August 15, 1977 (42 Fed. Reg. 36239 - 36240) and again in November 1980 (45 Fed. Reg. 73466), but did not materially change. In 1977, however, clear provision was added to the rule allowing the Commission to review, sua sponte directors' decisions that were denials to see if they constituted any abuse of discretion. That

amendment prohibited petitioners from seeking Commission review of a denial of a Rule 2.206 request by the Director:

> No petition or other request for Commission review of a Director's Decision under this section will be entertained by the Commission.

In the 1977 amendment to the Rule (42 F.R. 36239) under SUPPLEMENTAL INFORMATION, the Commission announced its policy on notice to parties in 2.206 actions, although these notice provisions were not incorporated into the rule:

> When such requests are received the affected licensee is notified and a notice of receipt is published in the Federal Register. This process is followed except for those occasional requests that are so obviously lacking in merit that a more abbreviated procedure may appropriately be followed. (emphasis supplied)

Shortly after the Commission established the rule known as 10 C.F.R. § 2.206, it also established, by its decis-

ions, criteria for implementation of a show cause order (10 C.F.R. § 2.202) under 10 C.F.R. § 2.206. It indicated that a show cause order must be issued where substantial health or safety issues concerning operation of a reactor have been raised, but need not be issued where only a mere dispute over factual issues exists.

> The Director correctly understood that show cause order would have been required had he reached the conclusion that substantial health and safety issues had been raised.

(Footnote omitted.) Consolidated Edison Company of New York, Inc. (Indian Point Units 1-3) CLI-75-8, 2 NRC 173, August 4, 1975.

The treatment of parties by the Commission when the rule was new is quite different from current Commission practice. Recently, States as well as public interest citizens have been denied the

opportunity to participate in Director's decisions. See Rodriguez v. NRC (voluntarily dismissed) No. 83-1805 (D.C. Cir. May 25, 1984, DD 83-6, 17 NRC 713 (1983) (State of New Jersey sought and was denied a hearing under 2.206, while the NRC was conducting a license proceeding); Bellotti v. NRC, 725 F.2d 1380, CLI-82-16, 16 NRC 44, 1982 (State of Massachusetts was denied participation in an NRC enforcement proceeding to modify a nuclear plant's operating license where severe safety problems existed).

In the early years of the Commission's implementation of Rule 2.206, while never formally recognizing any procedural or due process rights for requesters under the 2.206 process, petitioners typically were afforded some level of participation in the assemblage of a record as well as some relief if the claim was deemed to

have merit. It is interesting and of some significance to note, for example, that in Consolidated Edison, state and public interest participation was invited and the issues raised by petitioners were transmitted for review to an ongoing construction licensing proceeding before the Atomic Safety and Licensing Board for Indian Point Unit No. 3. See Consolidated Edison (Indian Point) 2 NRC 173, 179.

When petitioner in the above case, Citizens Committee for the Protection of the Environment (CCPE), filed a petition with the Commission for review of an adverse Director's Decision, " by order dated January 4, 1975, the Commission requested the views of the NRC Staff, the licensee and other interested persons as to the approriate measures to be followed." Consolidated Edison, id. at 174 (emphasis supplied). Respondents

included the New York Atomic Energy Council (NYAEC) as well as CCPE.

Indeed, in the early years the Commission explained the major reason for the existence of the procedure under 10 C.F.R. § 2.206 was for the consideration of:

> A significant unresolved safety issue or a major change in facts material to the resolution of major environmental issues [citing Vermont Yankee Nuclear Power Station ALAB-124, 6 AEC 358, (1973)] . . . .

Also, in Northern Indiana Public Service Company (Baily Generating Station Nuclear-1) CLI-78-7, 7 NRC 429 (1978), the Commission reiterated that:

> the standard to be applied in determining whether to issue a show cause order is, as we have said in Indian Point, whether substantial health or safety issues (have) been raised . . . .

The Commission emphasized that:

> [P]arties must be prevented from using § 2.206 procedures as a vehicle for the reconsideration of issues previously decided. . . . Northern Indiana at 434.

An evolution in the Commission expression of Rule 2.206 began when the Commission issued the changes at 42 F.R. 36239, 36240, on July 14, 1977, establishing notice criteria and provisions on Commission review of the Directors' decisions. The Commission's early practice showed some willingness to accommodate 2.206 petitioners while never formally acknowledging a "right to participate" in the 2.206 process. However, Commission practice since the late 1970's makes it clear that no procedural or due process rights are now accorded to a requester under 2.206.[20]

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20. The rule appears to have languished in relative non-use until 1979 when events changed rather abruptly. That year there were twenty-one (21) "Directors Decisions"

[Footnote continued on next page.]

The first case clearly expressing the Commission's interpretation that petitioners had no rights as a party in the 2.206 process occurred when the Commission issued its opinion in 1978 that the then little used agency process under the Rule

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20. (Continued)
or "Directors Denials" as the NRCI described them. In 1980, thirty-six (36) Directors Decisions went into the NRCI Volumes and another twenty-one (21) were reported in 1981. Why was there an avalanche of Directors Decisions reported beginning in 1979, when Rule 2.206 had languished virtually unused for the previous five years? It was perhaps more than coincidental that on the 28th day of March, 1979, the core began to overheat and almost melted at the Three Mile Island Nuclear Power Plant Unit No. 2 operated by General Public Utilities in Central Pennsylvania. America came face to face with near-nuclear disaster, an event (later classified as a Class 9 accident) that the U.S. Nuclear Regulatory Commission had assured members of the public could never and would never happen. A national concern about nuclear power arose. The Commission began to receive correspondence in diverse forms and origins from citizens, seeking to voice concerns about the safety of nuclear power plant operation. The agency responded with large numbers of Director's Denials.

at 10 C.F.R. 2.206 was "not a proceeding" within the meaning of section 189(a) of the Atomic Energy Act of 1954.

In Northern Indiana Public Service Company (Baily Generating Station Nuclear-4) ("Northern Indiana"), 7 NRC 429 (1978), aff'd, sub nom., Porter County Chapter Izaak Walton League, 606 F.2d 1364 (D.C. Cir. 1979), the petitioners raised the argument that the NRC Staff participated as a "party adversary" in the enforcement proceeding requested by the petitioners claiming that it is "fundamentally unfair and an unlawful combination of functions for the Staff to take part in the decision making" on petitioner's requests.

They also argued that these "dual and conflicting roles" are also prohibited by the APA, 5 U.S.C. § 551 et seq. (particularly 554); the Commission's Regulations at 10 C.F.R. §2.719, and procedural due

process guarantees. The Commission, in its memorandum and order answered these contentions by identifying two separate categories of responsibility or function of the Commission's subordinate staff members: the first dealing with "on the record adjudications and the second with "investigative or prosecutorial responsibilities." Thus it responded to petitioners:

> These contentions are in error both as a matter of law and of policy. Section 554 of the Administrative Procedure Act deals specifically with on the record adjudications, and is designed to assure the separation of functions between those persons with investigative or prosecutorial responsibilities and those with ultimate decisionmaking authority. Section 2.719 of the Commission's regulations has the same purpose. Here, however, no adjudication has been commenced, and the Administrative Procedure Act and 10 C.F.R. 2.719 clearly do not apply." * * *

Northern Indiana (Bailly), 7 NRC 429, 431 (emphasis supplied).

By identifying, in this first pertinently interpretive case, these two separate categories of responsibility for the subordinate NRC Staff Administrators, the Commission also defined two separate areas of its function--one a formal proceeding within Sec. 189 of the AEA, the other agency action not within Sec. 189. Thus function determines the legal basis for jurisdiction. It becomes clear that the Commission never intended, from the outset, that its prosecutorial, or investigative functions such as a Director's Denial be considered equivalent to those "on the record adjudications" or "proceedings" which come under either the APA at 5 U.S.C. § 554 or the AEA at § 189(a).

The Commission's view that the 2.206 process is not a proceeding within Sec. 189(a) has been reiterated over and over: "it is not a 'proceeding'.". . .

NRC Brief, pp. 23, fn.8, 24-25, also p. 25, fn.11.

The Court of Appeals has merely drawn attention to what should have been obvious before. Since they are not "proceedings" under the Act, Directors' Denials are not directly reviewable in the Court of Appeals.

Ms. Lorion had raised at least one substantial issue of material fact in her letter to the agency: The unacceptable safety risk presented by continued operation of the reactor in light of the NRC's own disclosures about reactor pressure vessel embrittlement and resultant susceptibility to pressurized thermal shock. The nature of the informal agency process at 2.206 did not permit a further opportunity for Ms. Lorion to reframe her request or submit such facts and other information as she might have submitted in

a formal proceeding. Nor did the Director provide Ms. Lorion with notice of the implementation of the Director's Decision process as was suggested under the agency procedures at (Supplemental Information) 42 F.R. 36239. Ms. Lorion raised at least one "serious health and safety issue" and had she been given the opportunity she might have produced evidence supporting her position. Clearly, she could have embellished the record by developing the NRC staff's own view that the reactor pressure vessel impairment was "approaching levels of concern,"[21] such that

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21. The reactor pressure vessel impairment is described by the Commission as "approaching levels of concern" due to its age coupled with the high levels of degradation being experienced. Letter Darrell Q. Eisenhut, Director, Division of Licensing, Office of Nuclear Reactor Regulation to Florida Power and Light Company, Robert E. Uhrig, V.P., August 21, 1981. Commission's Show Cause letter under 10 C.F.R. So. 54(f) R. Doc. No. 20, p. 1, J. App./ Index to J. App. Sup. Ct.

continued full power operation might pose a significant health and safety hazard.

The major flaw in the Director's development of the record lies in the fact it is a generic treatment, not a site specific one. Here Turkey Point fell on a worst-case category.

Although the Supreme Court held in Citizens to Preserve Overton Park, 401 U.S. 402 (1971) that fact finding beyond the administrative record is usually inappropriate, a reviewing court in considering whether the agency's decision was arbitrarily capricious or otherwise inconsistent with the law may examine the administrative record (1) as to its completeness, (2) whether the agency explained its decision correctly, (3) whether the administrative process was tainted, and (4) whether the agency's accounting in court of interpretation of

relevant regulations is consistent with its previous interpretations. Whatever its motive, the record compiled by the Commission here does not appear to be complete. In order to obtain imprimatur of the reviewing court, the agency must have included all relevant documents considered by it, not only those it relied upon. Pierson v. United States, 428 F. Supp. 381, 392 (D. Del. 1977). For example, the response the Commission had requested from FPL on the Pressurized Thermal Shock and Reactor Pressure Vessel Problem, due 60 days from August 21, 1982, (ref. R. Doc. No. 20, p. 147) were not included in the record or otherwise accounted for. Apparently, the Commission had granted some extension to FPL for response. This cannot be determined without reviewing documents extrinsic to the record. (See NRC Staff Evaluation of

Pressurized Thermal Shock Nov. 1982, p. A-16, Table A-1, entitled, "Summary of responses to NRC letters dated August 21, 1981 concerning thermal shock issue" dated, October 7, 1981. This document and its information does not occur in the record, yet it had existed in draft form in October 1981 and was published November 13, 1981 in final form. The information that the Turkey Point Unit 4 pressure vessel had exceeded four (4) effective full power years (EFPY) is not reflected in the record, (yet it had achieved 5.67 EFPY. See NRC Staff Evaluation of PTS, supra, Table P. 1); nor is any quantification of the quantity and deposition of copper in its pressure vessel reported. (See NRC Staff Evaluation of PTS, supra, Table P. 1. Reports 0.32% copper for Turkey Point Unit 4 according to the "best information available.") The only site

specific record reference is that Unit 4 falls into a category "approaching levels of concern" (NRC letter to FPL, August 21, 1981. Show cause letter under 10 C.F.R. 50.54(f) (R. Doc. No. 20, p.1).

Given the opportunity, Ms. Lorion could have developed site specific evidence through the testimony of NRC and FPL witnesses. They could have testified to the effect that, by the end of 1981, the Turkey Point Unit No. 4 had operated a total of 5.67 effective full power years. That length of operation placed it in that category of reactors which Mr. Basdekas, the NRC reactor safety engineer, had recommended be shut down after 4 EFPY due to their susceptibility to a core melt type accident.[22] On April 10, 1981, Mr.

22. A Nuclear Regulatory Commission Staff Report indicated that as of that time Unit 4 at Turkey Point had operated for 5.43 EFPY. See NRC Staff Evaluation of Pressurized Thermal Shock, Table P. 1,

[Footnote continued on next page.]

Basdekas had stated in a letter to the Honorable Morris K. Udall, Chairman, Subcommittee on Energy and the Environment:

> . . . it is apparent to me that those PWR's with high copper alloy welds that have operated 4 FPYE must be shut down . . . . Demetrios L. Basdekas NRC Safety Engineer letter to Honorable Morris K. Udall, Chairman, Subcommittee on Energy and the Environment April 10, 1981.

R. Doc. No. 15 J. Appendix, Index J. App. Sup. Ct.

Finally, and most significantly, had she been given an opportunity to participate, Ms. Lorion could have shown that the

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22. (Continued)

November 13, 1981. Also see The Miami Herald, September 8, 1981, "U.S. Reports Possible Flaws in N-Plants", also USNRC Issuance: NRC Staff Seeks Additional Information on Pressure Vessel Thermal Shock, Wed., Aug. 26, 1981, USNRC Office of Public Affairs, Atlanta, Ga. (FPYE (full power years effective) means simply the number of years a plant has operated at full power levels. The NRC Staff Evaluation of Pressurized Thermal Shock, 11-13-82, also tells us that the Turkey Point Unit 4 is one of those PWR's with high copper alloy welds (See Table P.1).

Commission's own probabalistic analyses of the likelihood of a pressurized thermal shock event coupled with reactor pressure vessel embrittlement had a much greater probability of occurance than the Commission's own 10 C.F.R. Part 50, and 100 criteria would allow.[23] By these and

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23. "Core Melt - The core melt safety goal guideline states, 'The likelihood of a nuclear reactor accident that results in a large-scale core melt should normally be less than one in 10,000 per year of reactor operation' (referencing 10 C.F.R. 100 setting guidelines on fission produced releases and 10 C.F.R. 50 guidelines). This suggests that the core melt frequency ascribable to one sequence, for example PTS, compared to other sequences should not exceed approximately 10-5 per reactor year.

"Because of the unusually large uncertainty in the risk estimation for PTS compared to other sequences, a value of less than 10-5 might well be assigned for a safety goal for PTS. We have not done this. The reader should keep in mind that the risk numbers of PTS given in the following discussion are highly uncertain.

"We have no technical analysis of the course and consequence of a PTS sequence that involves RPV (reactor pressure vessel) failure. . . ."

NRC Staff Evaluation of Pressurized Thermal Shock, Enclosure A, p.8-9, PTS Report Section 8, November 13, 1982. (The Enclosure is the main body of the report.)

other facts, most of which can be found in the ex parte record assembled by the Commission itself, it is clear that a genuine issue of material fact concerning a significant health and safety issue was presented.

Ms. Lorion could have contributed to developing a complete record had she been permitted to participate.

The agency's conduct of the record is flawed by its incompleteness and inadequacy. The flaw is directly ascribable to the Commission's failure to develop in the record relevant site specific data then available pertaining to the worst-case condition of the Turkey Point Plant. The flaw lies in the generic consideration of the RPV and PTS problem performed by the agency, while ignoring available site specific data. It is apparent that all relevant documents "directly or indi-

rectly" before the agency, considered or relied upon by agency subordinates, were not included and this serious omission thereby renders the agency record inadequate to the point of being defective. See Tenneco Oil Co. v. Department of Energy, 475 F. Supp. 299, 318, 319 (D. Del. 1979). Respondents here submit that they have demonstrated some reasonable basis for believing that the administrative record is incomplete.

The ruling of the court of appeals charts a new jurisdictional course for these informal agency actions. Only a few Director's Decisions have been reviewed by the various Courts of Appeals. By virtue of its location, the District of Columbia Circuit historically has played a central role in review of federal agency litigation. The 7th Circuit follows the District of Columbia Circuit in reviews of

Director's Decisions. Judge Luther M. Swygert of the 7th Circuit, sitting by special designation on the Lorion panel participated in the Court's decision here. Also, Judge Posner, Circuit Judge of the 7th Circuit wrote the decision in Rockford, supra, which was partially relied upon by the Court in Lorion in reaching its decision.

When the Supreme Court in the Overton Park case said the bare record may not disclose the factors that were considered by the official, 401 U.S. at 420, it implied that if the administrative record does not disclose the agency's considerations or interpretations of the evidence, the court may require "additonal explanation of the reasons for the agency decision as may prove necessary." Camp v. Pitts, 411 U.S. at 142-143.

This Court found that a de novo proceeding is appropriate only when the

fact finding process below is inherently defective. That is the case here. The major flaw in the record is its generic treatment of a site specific problem. The worst-case category of Unit 4 dictated site specific considerations be included in any fair analysis of the significance of health and safety considerations.

CONCLUSION

The judgment of the Court of Appeals should be affirmed. The case should be returned to that court so that its judgment may be given effect.

Respectfully submitted,

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